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NO. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JOSE (JOSEPH) TOMARGO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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COUNSEL FOR PETITIONER

QUESTION PRESENTED

Whether the United States Court of Appeals, Eleventh Circuit erred in failing to apply the circumstantial evidence rule to a reasonable hypothesis of innocence raised by the uncontroverted testimony of a witness and by physical evidence obtained by government agents.

THE PARTIES

A list of all the parties to this proceedings in the Court where the Judgment is sought to be reviewed should include the following co-defendant in the prosecution in the United States District Court for the Southern District of Florida is LARRY CARRILLO.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
THE PARTIES	i
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASON FOR GRANTING THE WRIT	4

The United States Court of Appeals, Eleventh Circuit acknowledged that the circumstantial evidence rule was applicable but failed to apply the rule to a reasonable hypothesis of innocence raised by uncontroverted trial testimony, and by physical evidence seized by government agents. Thus this Honorable Court should accept jurisdiction because the United States Court of Appeals:

1. Departed from the essential and fundamental requirements of law.
2. Deprived Petitioner of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.
3. Rendered an opinion in conflict with other opinions of the Fifth and Eleventh Circuits.

	PAGE
CONCLUSION	10
CERTIFICATE OF SERVICE	11
APPENDIX	12

TABLE OF AUTHORITIES

CASES

	PAGE
Burke v. United States, 437 U.S. 1, 98 S.Ct. 2141 37 L.Ed.2d 1 (1978)	10
Green v. Massey, 437 U.S. 19, 98 S.Ct. 2151 57 L.Ed.2d 15 (1978)	10
In re Winship, 397 U.S. 358, 90 S.Ct. 1063 25 L.Ed.2d 368 (1970)	8
Montoya v. United States, 402 F.2d 847, 850 (5th Cir. 1968)	8
United States v. Malatesta, 590 F.2d 1379, 1382 (5th Cir.) (en banc) cert. denied 440 U.S. 962, 99 S.Ct. 1508, 59 L.Ed.2d 777 (1979)	8
United States v. Spradlen, 662 F.2d 724, 727 (11th Cir. 1981)	6,8

OTHER AUTHORITIES

Constitution of the United States	
Fifth Amendment	2,3,7
United States Code	
18 U.S.C. 2	3
21 U.S.C. 841(a)(1)	3
21 U.S.C. 846	3
28 U.S.C. 1254(1)	2

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JOSE (JOSEPH) TOMARGO,

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v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

Petitioner, JOSE (JOSEPH) TOMARGO, respectfully prays that a WRIT OF CERTIORARI issue to review the judgment and opinion of the United States Court of Appeals, Eleventh Circuit entered in the case entitled UNITED STATES OF AMERICA v. JOSE (JOSEPH) TOMARGO, Case No. 80-5791 on April 9, 1982.

OPINION BELOW

The opinion of the United States Court of Appeal, Eleventh Circuit, opinion not yet reported, appears in the Appendix hereto. (App. 1.).

JURISDICTION

Petitioner seeks review of a final decision of the United States Court of Appeals, Eleventh Circuit rendered on April 9, 1982. Motion for Rehearing was denied May 12, 1982. This petition is filed within sixty (60) days from that date. Supreme Court Rules 20(1).

Jurisdiction is invoked pursuant to 28 U.S.C. 1254(1) which provides:

> Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree.

CONSTITUTIONAL PROVISIONS INVOLVED

The question presented involves the Fifth Amendment to the Constitution of the United States.

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

INTRODUCTION

Petitioner was charged in the United States District Court for the Southern District of Florida in Miami in a three count Indictment with (1) Conspiracy to violate 21 U.S.C. 841(a)(1) Prohibiting Possession with Intent to Distribute and Distribution of Methaqualone in violation of 21 U.S.C. 846; (2) Possession with Intent to Distribute Metaqualone in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2; (3) Distribution of Metaqualone in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. Petitioner plead

not guilty. Petitioner's Motion for Judgment of Acquittal was denied. The jury returned a verdict of guilty on all counts. Petitioner's Motion for a New Trial asserting insufficient evidence was denied. The court sentenced Petitioner to a term of four years on each count to run concurrently. On appeal to the United States Court of Appeals, Fifth Circuit (subsequently transferred to the newly formed Eleventh Circuit), Petitioner asserted that the Court below erred in denying his Motion for Judgment of Acquittal and Motion for New Trial for the circumstantial evidence did not negate every reasonable hypothesis of innocence and thus was insufficient to support the conviction below and denied Petitioner's Motion for Rehearing on May 12, 1982.

REASONS FOR GRANTING THE WRIT

Agent Rayner acquired information that Mr. Sheyes dealt in illegal sales of drugs and entered negotiations with Mr. Sheyes to make a purchase of drugs. The parties agreed to a transaction to occur on a certain date in a motel

in Miami, Florida. The investigation leading to the agreement had not disclosed the participation nor the existence of Petitioner. On the date of the transaction Agent Rayner called Mr. Sheyes at the motel and during the conversation heard a voice in the background which sounded as if the person spoke in a latin accent. There was no evidence produced at the trial that Mr. Tomargo spoke in a latin accent. Agent Rayner, later in the day, proceeded to the motel to complete the transaction. As he approached the door to the room occupied by Mr. Sheyes, two men, Mr. Carrillo and Mr. Sanchez approached. Mr. Sheyes admitted all three. Mr. Carrillo carried a package containing tablets of drugs. He placed them on a table next to a quantity of drugs. A third person was in the room. Mr. Sheyes introduced him as "Joe". This person was the Petitioner. Mr. Sheyes had referred to his supplier as "Joe". The transaction was discussed. During the conversation, Petitioner stated that there was a total of 36,000 qualude tablets and 32,000

were outside. Agent Rayner left the room, ostensibly to get the purchase money, returned with other agents and arrested all parties. Mr. Carrillo testified that he and the Petitioner had arranged for a sale of jewelry and government agents found jewelry in Petitioner's automobile.

The United States Court of Appeals in its opinion cited United States v. Spradlen, 662 F.2d 724, 727 (11th Cir. 1981) for the proposition that when reviewing the sufficiency of the evidence, the standard of review is whether in the light most favorable to the government, the jury could conclude that the evidence is inconsistent with every reasonable hypothesis of the Defendant's innocence.

This is a correct statement of the law. In the instant case, the United States Court of Appeals listed the essential elements of the crimes charged in the three counts and referred to testimony and evidence indicating that the elements were satisfied. The opinion made no reference to the fact that Mr. Carrillo testified that he and Petitioner has arranged a sale

of jewelry. This testimony was not controverted. The opinion made no mention that agents testified that during a search of Petitioner's car that they found jewelry. Thus the evidence raised the reasonable hypothesis that Petitioner was present not as part of the conspiracy to sell drugs, but for the entirely legitimate purpose of selling jewelry to Mr. Carrillo.

The United States Court of Appeals correctly acknowledge that the circumstantial evidence rule is applicable. However, the United States Court of Appeals failed to apply the rule to the reasonable hypothesis of innocence raised by the testimony of Mr. Carrillo and the evidence found by the agents in Petitioner's automobile. In fact, the United States Court of Appeals failed to acknowledge or recognize that a reasonable hypothesis of innocence was raised by the testimony and evidence.

The circumstantial evidence rule and its application is mandated by the Fifth Amendment to the Constitution of the United States. The purpose of the rule is to insure that guilt in

a criminal case is proven beyond a reasonable doubt. This degree of proof is required by the due process of the Fifth Amendment, In re Winship, 397 U.S. 358, 90 S.Ct. 1063, 25 L.Ed. 2d 368 (1970).

Thus in failing to apply the rule, the United States Court of Appeals departed from the essential and fundamental requirements of law and denied Petitioner due process of law.

Further, where the United States Court of Appeals recognized that the circumstantial evidence rule was applicable but failed to consider its impact where a reasonable hypothesis of innocence was raised by the testimony and evidence, the decision is in conflict with other decisions in the Fifth and Eleventh Circuits. United States v. Spradlen, supra; United States v. Malatesta, 590 F.2d 1379, 1382 (5th Cir.) (en banc) cert. denied 440 U.S. 962, 99 S.Ct. 1508, 59 L.Ed.2d 777 (1979); Montoya v. United States, 402 F.2d 847, 850, (5th Cir. 1968).

This Honorable Court should issue a Writ of Certiorari because the United States Court of

Appeals:

1. Departed from the essential and fundamental requirements of law.

2. Denied Petitioner due process of law.

3. Rendered an opinion in conflict with other opinions in the Fifth and Eleventh Circuits.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review judgment and opinion of the United States Court of Appeals, Eleventh Circuit. The decision of the United States Court of Appeals should be reversed and the Petitioner discharged pursuant to Green v. Massey, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed. 2d 15 (1978); Burke v. United States, 437 U.S. 1, 98 S.Ct. 2141, 37 L.Ed.2d 1 (1978).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of the Petition for Writ of Certiorari was mailed first class, postage prepaid to the Solicitor General, Department of Justice, Washington, D.C., 20530. I further certify that all parties required to be served have been served this 30th day of July, 1982.

Philip Carlton, Jr.

PHILIP CARLTON, JR.